Page

POINT II. Whether or not fraud was practiced by defendant or her attorney, due process was not denied petitioner and no federal question is presented 10

CONCLUSION. Petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be denied 12

CITATIONS.

Dohany v. Rogers, 281 U. S. 362 11

Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y. 199, 176 N. E. 141, affd. 284 U. S. 594, 52 S. Ct. 202 11

Lyons v. Goldstein, 290 N. Y. 19, 47 N E 2d 425 11

Mooney v. Holohan, 294 U. S. 103 11

Moore v. Dempsey, 261 U. S. 86 11

Reoux v. Reoux (after August, 1958, Reoux v. First National Bank of Glens Falls), 3 A D 2d 560; 4 A D 2d 805; 4 A D 2d 840; 4 N Y 2d 1022; 4 A D 2d 1005; 11 A D 2d 876; 13 A D 2d 868; 14 A D 2d 648; 16 A D 2d 543; 21 A D 2d 940; 16 N Y 2d 685; 16 N Y 2d 835 2

Tumey v. Ohio, 273 U. S. 510 11

Weitzner v. Strickman, 271 A. D. 255, affd. 271 A. D. 255, affd. 296 N. Y. 907, 72 N E 2d 625 11

IN THE

Supreme Court of the United States

October Term, 1965.

No. 819.

HARRY A. REOUX,

Petitioner,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS (as Executor of the Estate of Adelia H. Reoux, deceased),

Respondent.

Brief in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Counter-question Presented.

Was petitioner denied due process of law and a fair trial after eleven years of litigation in New York State courts culminating in a second review by the Court of Appeals?

On petition for re-argument the Court of Appeals considered that question and denied re-argument.

Counter-statement of the Case.

On August 11, 1954, petitioner sued his mother (Adelia H. Reoux) then 81 years of age, seeking to compel her to transfer to him certain securities. He based his complaint on a written instrument called a "Bill of Sale" which

petitioner had prepared for his mother's signature on April 11, 1954, when she was alone in the State of Florida.

The mother, in her answer (R. 10-15),* resisted petitioner's claim and counterclaimed for the return of other securities petitioner had taken from her in September, 1953.

After a trial in October, 1955, Official Referee Heffernan granted judgment in petitioner's favor on both the complaint and counterclaim.

First Appeal to the Appellate Division, Third Department.

On appeal, the Appellate Division of the Supreme Court, Third Department, on May 15, 1957, unanimously (Gibson, J., not sitting) reversed and found for the mother on both the complaint and counterclaim (*Reoux v. Reoux*, 3 A D 2d 560).

At page 562, the *per curiam* reads, in part:

> "* * * we think the plaintiff failed to sustain the burden which was cast upon him by the confidential relationship that existed between him and his mother, and *we reach this conclusion wholly from his own testimony* * * *." (Emphasis supplied.)

Re-argument of Counterclaim.

With new counsel, petitioner obtained re-argument of "so much of the appeal as concerned" the counterclaim.

At page 4 of his brief on that re-argument, petitioner quoted from his mother's August 2, 1954, letter to him, which she had offered in evidence on trial as her exhibit "E." This is the same letter petitioner quotes in full at

* Record citations are to the Record on Appeal filed in the Supreme Court of the United States by petitioner.

pages 8-9 of his petition herein. Petitioner based much of his re-argument on this letter, a letter strikingly similar to the "new evidence" letter produced later.

On June 24, 1957, the Appellate Division adhered to its original determination (4 A D 2d 805).

The mother then made application for a reference to take an accounting of the securities involved in the counterclaim. The Appellate Division appointed the late John J. Conway, Esq., as Referee (4 A D 2d 840).

Mr. Conway's report was confirmed (4 A D 2d 992) and judgment entered against petitioner for $99,306.54 December 3, 1957.

Appeal to the Court of Appeals.

Petitioner appealed to the Court of Appeals. In his brief to that court he again quoted his mother's August 2, 1954, letter and based much of the first point of his argument for reversal on the same letter.

The Court of Appeals unanimously affirmed June 25, 1958 (4 N Y 2d 1022).

Efforts to Collect the Judgment.

Adelia H. Reoux died on August 18, 1958.

Meanwhile, petitioner had refused to answer questions in supplementary proceedings and had unsuccessfully contested probate of his mother's last will and testament.

Mrs. Reoux's executor, as temporary administrator, pursued the supplementary proceedings and on December 31, 1959, the Supreme Court, Appellate Division, Third Department, found petitioner in contempt and fined him the amount of that court's former judgment, $99,306.54 (9 A D 2d 1005).

Petitioner's Contempt Continued.

On July 27, 1960, the Appellate Division denied the executor's motion for punishment of the contempt and directed the motion be renewed at Special Term (11 A D 2d 876).

The Motion for a New Trial.

During the pendency of that motion at Special Term (Aulisi, J.) petitioner in January, 1961, moved for a new trial on the ground of newly discovered evidence.

The Special Term (Best, J.) denied the motion on the merits, although petitioner had not made his mother's executor a party.

Petitioner appealed and the Appellate Division, after permitting the executor to intervene (13 A D 2d 868), dismissed the appeal without prejudice (14 A D 2d 648).

When petitioner renewed his motion at the October 31, 1961, Ballston Spa Special Term, Justice Best again denied it on the merits writing an opinion.

Justice Best wrote, in part:

> "As I read the findings made by the Appellate Division, Third Department and the opinion of such court, it appears to me their holding and determination was to the effect that Mrs. Reoux did not voluntarily part with the securities even though she did make a transfer of such property to her son. Reviewing and considering the alleged newly discovered evidence in this light, this Court is not convinced that a new trial would be likely to change the result as indicated by the new findings and the decision of the Third Department."

Appeal to the Appellate Division, Third Department.

On July 13, 1962, an appeal of the petitioner, the Appellate Division, Third Department, reversed and granted an order (16 A D 2d 543), later modified by an order of that court dated December 20, 1962, directing a new trial only of respondent's counterclaim.

The New Trial.

The new trial came on before Mr. Justice Michael E. Sweeney without a jury on January 2, 1963, and resulted in a dismissal on the merits of respondent's counterclaim and a vacating of respondent's judgment by a new judgment entered August 1, 1963.

The Trial Term's opinion (R. 170) correctly set forth the question presented (R. 171, 172).

> "Defendant contends that the proof produced on the retrial indicates that the transfer of the stocks in question did not constitute a gift freely and voluntarily made, but resulted from the influence and coercion exerted by the plaintiff upon his aged mother while he was acting in a son-mother, lawyer-client relation with her. Defendant further maintains that the letter of November 9, 1953, which accompanied the execution of the will of that date and which was the newly discovered evidence upon which the Appellate Division granted a new trial, does not debilitate its contention.
>
> "Plaintiff contends that the transfer of the securities in question was voluntarily and freely made. He further maintains that the letter of November 9, 1953, not only supports this contention, but also re-affirms the original gift.
>
> "The sole question to be determined is whether or not the proof offered on the retrial is sufficient to establish a free and voluntary gift of the securities in question."

Justice Sweeney then reviewed the "new" evidence and summarized it (R. 175):

> "* * * first, she engaged a disinterested lawyer and prepared a new will by which she left nothing to the plaintiff-son. Secondly, she carefully explained this act to the Executors, and finally, she wrote the letter of August 2, 1954, again referring to the securities, some of them by name, as gifts."

He then concluded (R. 175):

> "I conclude therefore, from all of the proof and particularly these last mentioned acts, two of which were done with the aid of counsel and all of which were done at a time when she was not under the control of the plaintiff, that the mother, in her own mind, had finally straightened out once and for all the disposition of her property and intended to let the matter end there.
>
> "In summary, I conclude on this record that the transfer of the securities to plaintiff in September of 1953 was intended to be a gift, and further that it was freely and voluntarily made."

The Appellate Division's Affirmance.

The Appellate Division, *per curiam,* after summarizing the same facts, held (R. 185) (21 A D 2d 940):

> "* * * We think that the trier of the fact could find that this additional proof was sufficient to tip the scale in plaintiff's favor and on the record as now constituted that he had sustained the burden of proof cast upon him by reason of the confidential relationship which existed between him and his mother."

Appeal to the Court of Appeals.

On appeal, by permission of the Court of Appeals, the order of the Appellate Division was unanimously reversed (16 N Y 2d 685).

In its *per curiam* decision the court stated at page 686:

> "* * * The law of the case is that plaintiff, Harry Reoux, acting as both an attorney and as a son, had the burden of establishing by 'clear and satisfactory' evidence that the transfer of the securities in question was a 'valid and voluntary gift' on the part of his mother, a burden which he failed to meet (*Reoux v. Reoux,* 3 A D 2d 560, affd. 4 N Y 2d 1022)."

Petitioner's motion for re-argument was denied July 9, 1965 (16 N Y 2d 834).

Renewed Efforts to Collect the 1957 Judgment.

The executor then proceeded to attempt to collect the 1957 judgment and discovered petitioner had moved from New York State and was residing in the State of Vermont.

Petitioner's application to stay the executor from proceeding with an execution sale was denied by the Court of Appeals (Fuld, J.) (16 N Y 2d 835) and by the United States Supreme Court (Harlan, J., November 16, 1965).

POINT I.

Introduction into evidence of the November 9, 1953, will and the letter of even date upon the original trial would not have altered the ultimate result.

It is petitioner's claim that he was denied a fair trial and due process of law by reason of respondent's attorney's "suppression" of a certain "November 9, 1953, will and letter" upon the original trial.

At the outset, it should be made clear that there is not one scintilla of evidence to show that respondent's at-

torney had any knowledge, whatsoever, upon the original trial, of the letter dated November 9, 1953.

This letter, which was the basis of the granting of a second trial to petitioner, was signed by the mother at the time she executed her new will on November 9, 1953. Both the letter and the will were prepared by Alfred D. Clark, attorney for The First National Bank of Glens Falls, the executor (R. 77).

A) The Will.

Petitioner had himself prepared the next preceding will dated July 21, 1953, and under that will received approximately one-half his mother's estate.

The petition (pp. 10-11) asserts first that the mother's counsel deceived the court by placing this "share—equally" will in evidence thereby inducing the "Appellate Court" to place "great stress" upon its existence and terms.

Nothing could be farther from the truth.

The mother's counsel's purpose in presenting the July will to the court was to destroy, by this document which petitioner drew, the very basis of his claim against his mother.

For while in 1954, when he was concocting this extraordinary lawsuit against his mother, he claimed to have spent "literally thousands of unrecompensed hours" in serving his parents (Petition, p. 4), in 1953 he drew a will and procured his mother's signature to it in which he caused her to forgive a $10,000 debt which he owed her in consideration of the *same* "thousands of unrecompensed hours."

Moreover, the "Appellate Court" did *not* place "great stress" on the July will.

The Appellate Division in their April, 1957, decision (Petition, p. 20-a), after reciting the sharp questions of fact and after mentioning the July, 1953, will in passing (Petition, p. 22-a), expressly stated (*id.* p. 23-a):

> "In the light of these simple principles we think the plaintiff failed to sustain the burden which was cast upon him by the confidential relationship that existed between him and his mother, *and we reach this conclusion wholly from his own testimony.*" (Emphasis supplied.)

Surely it must have occurred to petitioner or to his counsel that the mother, whose last years *their* lawsuit was making miserable, would hardly leave in effect a document voluntarily giving petitioner what she was seeking so desperately to keep from him!

His *claim* of surprise to learn of a new will after her death surely could not have been genuine.

B) The Letter.

When she executed her last will, the mother signed a letter in the handwriting of Alfred D. Clark, Esq., attorney for The First National Bank of Glens Falls, who prepared her will.

The letter reads:

> "November 9, 1953. The First National Bank of Glens Falls, New York. Gentlemen: By my will of this date, I have made no provision for my son, Harry Reoux. My reason for this action is that I have made transfers of securities to him in my lifetime, which with his other assets, should adequately provide for him and his family. I have reached this conclusion without suggestion from anyone, and as a result of considerable thought on my part. Very truly yours, Adelia H. Reoux. Witnesses: B. W. Francis, A. D. Clark."

In its latest opinion the Court of Appeals described these documents as follows:

> "The newly discovered evidence consisted only of the will dated November 9, 1953, disinheriting plaintiff and a letter of even date explaining the disinheritance. *These documents in no way refute plaintiff's own admissions of undue influence and overreaching, nor do they reveal any donative intent on the part of the mother as to the securities in question.*" (Emphasis supplied.)

The Court of Appeals thereby rejected the very argument petitioner urges upon this court when he states in his "question presented," at page 3 of his petition "was petitioner denied due process * * * by the suppression of evidence * * * where the effect of this suppression was to prevent evidence from coming before the court at the one point in time when it would have conclusively proved petitioner's case?"

POINT II.

Whether or not fraud was practiced by defendant or her attorney, due process was not denied petitioner and no federal question is presented.

It is interesting to note that the numerous allegations of fraud and deceit are made only in form of legal memoranda. There is not one shred of evidence to support these allegations and, in fact, the transcript of the second trial is entirely void of any such inference.

In any event, *whether or not fraud was practiced* by defendant or her attorney, *due process was not denied* petitioner.

The question of fraud was raised by petitioner in his application for re-argument and rejected (16 N Y 2d 834).

Petitioner's claim of denial of due process and a fair trial could not be further from the truth. Quite to the contrary, the petitioner received two trials, three full Appellate Division hearings, two reviews by the Court of Appeals and numerous Special Term arguments and petitions for re-arguments over more than eleven years and before (by petitioner's own count) thirty-six different jurists.

Now, while residing in the State of Vermont, to avoid the legal process necessary to enforce the judgment, the petitioner prays this court to hold he has been denied due process!

Due process requires that in order to affect the rights of a party, a competent court, duly constituted, and having proper jurisdiction must hear the matter at issue.

Dohany v. Rogers, 281 U. S. 362;
Lyons v. Goldstein, 290 N. Y. 19, 47 N E 2d 425;
Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y. 199, 176 N E 141, affd. 284 U. S. 594, 52 S. Ct. 202;
Weitzner v. Stickman, 271 A. D. 255, affd. 271 A. D. 255, affd. 296 N. Y. 907, 72 N E 2d 625.

As pointed out above, the petitioner received this and much, much more.

In the cases cited by petitioner, i. e., *Tumey v. Ohio,* 273 U. S. 510; *Moore v. Dempsey,* 261 U. S. 86 and *Mooney v. Holohan,* 294 U. S. 103, the transcripts demonstrated conclusively that personal pecuniary interest of the judge, mob rule and overreaching by presentation of known perjured testimony were exercised to the prejudice of the petitioners. Such is not the case at bar. The record is void of any showing of improper conduct on the part of anyone but the petitioner himself.

It would be an unwarranted extension of present law to grant a writ of certiorari to petitioner on the basis of unsworn claims unsupported by any factual showing of suppression of evidence.

This is particularly true where petitioner has been granted a second trial on the basis of the very same evidence he claims was suppressed on the original trial.

CONCLUSION.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

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